IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1597

CERTIFIED GROCERS OF CALIFORNIA, LTD., a California corporation,

Petitioner,

vs.

ANTONIO R. LEYVA, EDWARD A. BELL, RICHARD O. BRENNER, DAVID CAHAL, WELDON R. CHAPMAN, RICHARD CHASE, GARTH E. COOK, MICHAEL J. COOK, ROBERT S. CROMWELL, CLYDE V. DARR, WESLEY DRAKE, VERN ELLYSON, GEORGE W. FIELDS, JR., PAUL A. FOX, JR., WALTER C. FREEMAN, ROBERT LeROY FULLER, RODNEY G. GOAR, DAVID G. GOLDSMITH, EVERETT JOHNSON, MARSHALL D. JOHNSON, ALBERT G. KNOLL, LEE A. LEWIS, THOMAS P. LUCAS, JOHN J. LUTZ, HARRY C. McMULLAN, FRANCIS C. MILLER, DONALD A. NELSON, WILLIAM D. PATTERSON, LARRY T. PEARCE, BOB ROBERTS, ROBERT J. SABOL, DAVID P. SCHOLERS, DONALD RAY TOWE, ROBERT S. WELLS and ARTHUR WOOLEY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 19, 1979.

Citation to Opinion.

The opinion of the Court of Appeals, which remanded the cause to the United States District Court for the Central District of California for further proceedings, is printed in Appendix A hereto and is not yet reported in the Official Reports.

Jurisdiction.

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. As a matter of law, are wage claims allegedly arising under the Fair Labor Standards Act exempt from a broad arbitration clause in a collective bargaining agreement which encompasses "any controversy, dispute, or disagreement" arising from the "interpretation of the agreement," thereby entitling employees covered under such an agreement to bypass the arbitral process and bring suit in the United States District Court?

2. Do the provisions of the Fair Labor Standards Act constitute the sole and exclusive remedy for wage and hour claims arising thereunder?

3. Should the well established presumption of arbitrability under federal law be abrogated where a federal statutory remedy is asserted?

Statutes Involved.

The pertinent provisions of Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. §185), the Fair Labor Standards Act (29 U.S.C. §§201, *et seq.*), and Section 3 of the United States Arbitration Act (9 U.S.C. §3) are set forth in the Appendix at pp. 15 *et seq.*

Statement of the Case.

This action was commenced against petitioner by certain of its long haul drivers for allegedly unpaid overtime. The complaint in one count alleges a breach of the collective bargaining agreement between petitioner and Teamsters Union Local 848, and in other counts a violation of the Fair Labor Standards Act.

The District Court issued an order filed February 1, 1977, granting petitioner's motion for an order for stay of action pending arbitration. The Court contemporaneously made a finding that the dispute alleged in the Complaint was subject to arbitration under the terms of the aforementioned collective bargaining agreement.

The Court of Appeals remanded the cause to the District Court for further proceedings, expressly finding that the count of the Complaint which alleges a violation of the Fair Labor Standards Act is not arbitrable under the broad arbitration clause of the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's decision that a claim under the Fair Labor Standards Act is by law exempt from a broad arbitration clause in a collective bargaining agreement is in conflict with the federal labor law policy favoring arbitration, and raises substantial and important questions concerning the role of the arbitral process in disputes where federal statutory rights are also asserted.

Implicit in the questions presented is the resultant erosion of the arbitral process in disputes covered by collective bargaining agreements and a potential concomitant increase in such disputes being presented to the United States District Courts with the obvious corresponding burden on the efficiency of the federal judicial process.

Arbitration has become so effective in the resolution of disputes that by 1952 a comprehensive study showed that with the exception of personal injury lawsuits or actions where the government is a party, in excess of 75 percent of all civil cases were being decided by arbitrators. *Mentschikoff*, The Significance or Arbitration—a Preliminary Inquiry (1952), 17 Law & Contemporary Problems 698.

The policy which favors and encourages arbitration of labor disputes is particularly well established in federal law, having been emphatically articulated by this Court in the well known cases of *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

The Court of Appeals was called upon to reconcile this policy with a series of decisions which emphasized the exclusivity of judicial remedies in the enforcement of statutory rights, *e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 91 S.Ct. 409 (1971). The Court of Appeals decision does not meet this challenge and a definitive determination is necessary from this Court on this issue.

This larger issue of reconciliation of the federal policy favoring arbitration with the policy of exclusivity of judicial enforcement of federal statutory rights is especially in need of a conclusive determination in claims arising under the Fair Labor Standards Act. As the Court of Appeals observed, a distinct conflict in the circuits exists, the Third, Ninth and Tenth Circuits having taken the position that Fair Labor Standards Act claims are arbitrable under collective bargaining agreements (*Evans v. Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3d Cir. 1945) *cert. denied*, 327 U.S. 816; *Beckley v. Teyssier*, 332 F.2d 495 (9th Cir. 1964); *Satterwhite v. United Parcel Service Inc.*, 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 419 U.S. 1079, and the Court of Appeals for the District of Columbia having taken a contrary view (*Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975))).

This clear conflict creates confusion and unpredictability with respect to the application of the law. In view of the necessity for the preservation of the policy supporting the arbitration of labor disputes, and in

the light of the clear conflict which exists in the various circuits, it is submitted that this Court in the exercise of its supervisory powers over the federal judiciary should settle these important questions of law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

DATED: April 18, 1979.

Respectfully submitted,

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THOMAS S. KERRIGAN,
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Attorneys for Petitioner Certified Grocers of California, Ltd.

APPENDIX.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Antonio R. Leyva, et al., Plaintiffs-Appellants, v. Certified Grocers of California, Ltd., Defendant-Appellee. No. 77-2116.

Filed March 19, 1979.

Appeal from the United States District Court for the Central District of California.

Before: SNEED and KENNEDY, Circuit Judges, and CALLISTER,* District Judge.

KENNEDY, Circuit Judge:

This is an appeal from the district court's order for a stay of the action "until arbitration has been had in accordance with the collective bargaining agreement." We have jurisdiction under 28 U.S.C. § 1292 (a)(1). *See Beckley v. Teyssier*, 332 F.2d 495, 495 n.2 (9th Cir. 1964).

The appellants are thirty-five delivery truck drivers employed by Certified Grocers of California Limited (Certified). They are members of the wholesale Delivery Drivers & Salesmen's Local 848, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. The Union and Certified were parties to a collective bargaining agreement in force during the period relevant to this dispute. The appellants filed suit against Certified, alleging Fair Labor Standards Act violations and breach of the collective bargaining agreement.

---

*Honorable Marion Jones Callister, United States District Judge for the District of Idaho, sitting by designation.

The action against Certified was begun in state court. The first count is based on the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201 *et seq*. The employees allege that Certified failed to pay time and one half for work in excess of forty hours per week, and they seek unpaid overtime wages for the three year period prior to the date of filing, liquidated damages in an equal amount, and attorneys' fees pursuant to 29 U.S.C. § 216(b). The second claim for relief, also based on failure to pay wages due, alleges that such failure was a violation of the collective bargaining agreement. Recovery is sought on this claim for a four year period prior to the date of the action. The action was removed by Certified to the United States District Court for the Central District of California. Both the claim under the FLSA and the claim based on a breach of the collective bargaining agreement present federal questions. 29 U.S.C. § 185.

The bargaining agreement to which the Union and Certified are parties is known as the Wholesale Delivery Drivers Agreement. Certified alleges that this master contract has been modified by an addendum known as the Long Haul Agreement. One of the issues in the case is whether or not the Long Haul Agreement is a proper modification of the principal contract, the employees contending that it has not been ratified by the Union membership. Appellants' contract claim under count II of the complaint is based solely on the overtime pay provisions of the principal contract, and not the addendum.

Both the Wholesale Drivers Delivery Agreement and the Long Haul Agreement provide for a multi-step grievance procedure culminating in binding arbitration

to resolve disputes pertaining to the contract. In reliance on the arbitration provisions, the district court granted Certified's motion to stay both the FLSA and contract claims until after arbitration. The court acted pursuant to section 3 of the United States Arbitration Act, 9 U.S.C. § 3, which provides that suits raising issues referable to arbitration shall be stayed on application of one of the parties. Appellants argue that the contract claim is not referable to arbitration and that even if it were the action should not be stayed in the circumstances of this case because of the Union's position on the claim. The appellants contend further that the FLSA claim is not referable to arbitration because it is a statutory action independent of the contract.

Appellants argue their contract claim is not referable to arbitration. The principal contention in this regard stems from the limited nature of the relief which the arbitrator is empowered to provide under the contract. The arbitration article of the principal agreement, incorporated by reference in the Long Haul Agreement, provides that: "Any claims for compensation shall be limited to a maximum of six months retroactivity from the date the claim is submitted to the employer in writing." Appellants seek broader relief under the contract by demanding back pay for four years, relief which they contend they are entitled to under state law.[1] That may or may not be the case, but the collective bargaining agreement binds them to arbitrate all issues arising out of the interpretation or application

[1]Appellants claim that the California four-year statute of limitations applies and that the six-month limitation on recovery was intended to be merely a limitation on the power of the arbitrator to make awards rather than a limitation on any recovery for compensation under the contract.

of the agreement. A limitation on the arbitrator's power is not a reason for bypassing arbitration where the claim is made upon the contract itself and is within the scope of the arbitration clause.[2]

The employees say the contract issue is not referable to arbitration because an arbitrator would lack power to dispose of various claims concerning the contract. They contend that the Long Haul addenda are void because their key provisions were not submitted to the Union membership for ratification and that the arbitrator would be without power to adjudicate the validity of the addenda.[3] Appellants apparently argue that arbitration of this issue is precluded since the agreement provides that the arbitrator "shall not have authority to change, alter, or modify any of the terms or provisions of this Agreement." The Supreme Court has made clear that in construing an exception to an arbitration clause, all matters will be deemed subject to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

[2]In addition, as part of the FLSA claims, appellants have requested liquidated damages and attorneys' fees. The fact that appellants have joined the claim for relief based on the FLSA in no way affects whether the claims for relief on the contract are arbitrable. As a general rule, parties cannot avoid arbitration by combining nonarbitrable claims with ones that are proper subjects of arbitration.

[3]Appellants also contend that the Long Haul addenda are void because they violate California Labor Code §223 which provides:

> Where any . . . contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by . . . contract.

However, if the arbitrator determines that the Long Haul addenda were a part of the contract it would follow that wages paid in accordance with a contract do not violate §223.

Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (footnote omitted). The fact that the arbitrator lacks the power to modify the agreement does not compel the conclusion that he also lacks the power to determine which provisions are in fact a part of the contract. A necessary first step in interpreting any contract is to determine exactly what language is controlling in the case. Absent a clear limitation on the arbitrator's authority, we decline to read the exception clause in this contract to limit the arbitrator's power in the manner suggested by appellants.

The case of *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), is not to the contrary. There, in holding that a claim of fraud in the inducement of a contract is one generally referable to arbitration, the Supreme Court also observed that a specific attack on the validity of the arbitration clause is not. That rule is inapplicable to prevent arbitration here because the appellants challenge only the validity of certain provisions of the contract, not the validity of the arbitration clause itself. Thus, we conclude that the trial court was correct in ruling that proceedings under count II of the complaint for recovery on the contract should be stayed pending arbitration, as provided by the collective bargaining agreement.[4]

We turn now to the objections the appellants make to the district court's order for a stay of proceedings on their claim for relief under the FLSA, alleged in count I of the complaint, pending arbitration of

[4]We discuss below the allegation of the appellants that the Union cannot in good faith arbitrate the dispute on their behalf.

the claim pursuant to the collective bargaining agreement. We have determined that the FLSA claim is not subject to arbitration under the collective bargaining agreement and that the defendant was not entitled to a stay as a matter of right under the provisions of the Arbitration Act; we conclude further that the district court, nevertheless, has the authority to stay adjudication of the FLSA claim upon finding that certain express conditions, explained further below, pertain to the case.

At the outset we note that unless the parties have explicitly agreed to the contrary, it is a matter for the courts, not the arbitrator, to decide whether the parties have agreed to submit specific issues to arbitration. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964); *see Gangemi v. General Electric Co.*, 532 F.2d 861, 865 (2d Cir. 1976). This rule derives from the fact that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). "No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 374 (1974). Of course, in construing arbitration clauses we must remain cognizant of the strong policy favoring arbitration of labor disputes, *see United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and of the general principle that "|d|oubts should be resolved

in favor of coverage." *Warrior & Gulf, supra*, 363 U.S. at 582-83.

The principal collective bargaining agreement, (the Wholesale Delivery Drivers Agreement) provides for arbitration of a defined class of disputes. Specifically, the arbitration clause applies to "any controversy, dispute, or disagreement aris|ing| during the period of this Agreement, out of the interpretation or application of the provisions of this Agreement. . . ." Whether the Long Haul Agreement is a proper addendum to the Wholesale Delivery Drivers Agreement is a matter of dispute between the parties but, even assuming it to be applicable, the addendum too has an arbitration clause pertaining to "any disputes that may arise as to the application of this agreement and as to the modification of any runs established under this agreement."[5] Essential to our disposition of the case is

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[5]Article XVII of the Wholesale Delivery Drivers Agreement provides:

> Should any controversy, dispute, or disagreement arise during the period of this Agreement, out of the interpretation or application of the provisions of this Agreement there shall be no form of economic activity by either party against the other because of such controversy, dispute or disagreement, but the differences shall be adjusted as follows:
>
> . . . .
>
> The decision of the arbitrator shall be final and binding upon the parties hereto provided that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

The relevant portions of the Long Haul Agreement state: Subsequent to the execution of this agreement, an Employer shall become covered upon thirty (30 days' notice to the appropriate union, provided the conditions set forth in Paragraph 1 above are met. Any dispute concerning the application of the Employer's operations to the above conditions shall be subject to the grievance and arbitration procedure in the basic agreement.

. . . .

(This footnote is continued on next page)

a determination whether or not the FLSA claims are within these arbitrations provisions. We conclude they are not because the arbitration provisions of both contracts are limited to disputes arising from the contracts themselves, and the FLSA claims are statutory rights existing independently of the contracts.

We acknowledge that our interpretation of the contract clauses in question is contrary to our interpretation of substantially similar language contained in the collective bargaining agreement at issue in *Beckley v. Teyssier, supra.* There we held that a FLSA claim was arbitrable under a collective bargaining agreement in which the arbitration clause was limited to "[a]ll grievances or disputes, other than jurisdictional disputes, arising out of the interpretation or application of any of the terms and conditions of this agreement . . . ." 332 F.2d at 496. The reasoning of that opinion was that FLSA claims are "ones growing out of the relationship of the employer and employee and necessarily involve the application and interpretation of the contract provisions." *Id.* at 497. We do not think *Beckley's* interpretation of the contract controls the instant case. One reason which justifies a departure from the *Beckley* approach in determining whether FLSA claims are

An Operations Committee, consisting of two (2) members to be appointed by the Joint Council of Teamsters No. 42 and two (2) members to be appointed by the Food Employers Council, Inc., shall be established to hear any disputes that may arise as to the application of this agreement and as to the modification of any runs established under this agreement. The parties shall, no later than one (1) week following the adoption of this agreement, name their appointees and alternates to the Committee and the Committee shall meet within one (1) calendar week upon the call of either party. Disputes unresolved by the Committee shall be referred to the grievance and arbitration procedures of the basic contract.

arbitrable is that the agreement here contains additional provisions, apparently not present in the *Beckley* contract, which indicate that the parties themselves did not intend the arbitration procedures to apply to FLSA claims. The contract before us limits arbitration of compensation claims to "a maximum of six months retroactivity from the date the claim was submitted to the employer in writing." Under the FLSA an action for wages may be commenced within two years after accrual of the cause or, in the case of a willful violation, within three years thereafter. 29 U.S.C. § 225(a). Also, the Act provides for liquidated damages, costs, and attorneys' fees, protections not expressly provided by the collective bargaining agreement.[6] These substantial differences in coverage between the contract arbitration provision and the FLSA are evidence that the parties did not intend to substitute arbitration procedures for enforcement of the statutory right.

A further reason for adopting our interpretation of the contract is to permit a construction of the arbitration clause that is consistent with direction given by the Supreme Court in *Iowa Beef Packers Inc. v. Thompson,* 405 U.S. 228 (1972). In that case, the Supreme Court found a significant distinction between contract and statutory rights and relied on that distinction in dismissing the case where certiorari had been granted. The collective bargaining agreement in *Iowa Beef* provided for arbitrability of grievances "pertaining to a violation of the agreement," language very similar to the arbitration clauses both here and in *Beckley*. The Court held that the question whether judicial enforcement of a FLSA claim could be stayed pending arbitra-

[6]The Wholesale Agreement provides that all costs of arbitration will be split between the employer and the Union.

tion was not presented by the case because the arbitration clause was insufficient to cover a statutory claim and so inapplicable in any event. The Supreme Court's construction of the arbitration agreement in *Iowa Beef* is consistent with its holdings in other cases which have emphasized the distinction between statutory and contract rights. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971); *see Lerwill v. Inflight Motion Pictures Inc.*, 582 F.2d 507, 513 (9th Cir. 1978). We believe that despite the general rule that arbitration clauses should be broadly construed, *Iowa Beef*, when viewed in conjunction with these other cases, counsels that contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provision for such arbitration. Here, not only is there no express provision for arbitration of statutory claims, there is, as discussed above, a strong indication of contrary intent.

Because the FLSA claims here are not within the scope of the arbitration clause, it is unnecessary for us to address the substantive holding of the *Beckley* case that where an FLSA claim is arbitrable, a stay of judicial enforcement must be ordered pending resolution by the arbitrator. The Third Circuit is in accord with our rule in the *Beckley* case. *Evans v. Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945), *cert. denied*, 327 U.S. 777 (1946); *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943). *See also Satterwhite v. United Parcel Service Inc.*, 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (discussing the effect of voluntary submission to arbitration prior to judicial determination

of the FLSA claims). The Court of Appeals for the District of Columbia, relying on the intervening cases of *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), has taken a contrary view. *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975). Even upon the assumption that we are free to reexamine the substantive holding of *Beckley* which does not turn on the interpretation a particular contract without convening the court en banc, a proposition not free from doubt, our disposition of the case makes any such reexamination quite unnecessary.

Having determined that the Fair Labor Standards Act claim in count I of the complaint is not arbitrable, we rule that the defendant was not entitled to a stay pursuant to section 3 of the Arbitration Act, 9 U.S.C § 3. We do find, however, that sound reasons may exist in the case to support the district court's determination to stay the action under the powers to control its own docket and to provide for the prompt and efficient determination of the cases pending before it.

Count II of the complaint, the action for wages due under the collective bargaining agreement, is an arbitrable dispute, for the reasons noted at the outset of this opinion, and the defendant was entitled to a stay of this part of the action pending its arbitration. In resolving this dispute, the arbitrator would no doubt make findings as to what contract documents are controlling, the hours and work pattern of the claimants, and the amount of wages paid to them. We think such matters are within the subjects committed to arbitration by the terms of the agreement. These findings, as well as the documents and testimony produced during the arbitration hearing, may be of valuable assistance

to the court in resolving the Fair Labor Standards Act claims presented in count I of the complaint, even under the assumption that the court is not bound and controlled by the arbitrator's conclusions, a point we decline to address.

A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995-1000 (8th Cir. 1972); *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm'n*, 387 F.2d 768, 773 (3d Cir. 1967); *Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964); *Chronicle Publ. Co. v. National Broadcasting Co.*, 294 F.2d 744 (9th Cir. 1961). In such cases the court may order a stay of the action pursuant to its power to control its docket and calendar and to provide for a just determination of the cases pending before it.

We remand this case to the district court so that it may have the opportunity to determine whether such circumstances are present here, and if so whether they justify continuance of the stay previously entered. In view of the urgent nature of the statutory right to minimum compensation provided by the Fair Labor Standards Act and the strong congressional policy favoring prompt payment of wages, *see Brooklyn Savings Bank*

v. O'Neil, 324 U.S. 697, 707 n.20 (1949), it is appropriate for the district court, if it does make express findings that a just and efficient determination of the case will be promoted by a stay, to consider conditioning any stay upon receipt of satisfactory assurances that the arbitration is proceeding with diligence and efficiency. A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court.

It would waste judicial resources and be burdensome upon the parties if the district court in a case such as this were mandated to permit discovery, and upon completion of pretrial proceedings, to take evidence and determine the merits of the case at the same time as the arbitrator is going through a substantially parallel process. We have little doubt the trial court was cognizant of these considerations in making its earlier ruling, but we remand so that it may have the opportunity to make its findings free from the constraints imposed by the not unlikely inference that under *Beckley v. Teyssier* we might have interpreted the contract to provide for arbitration of FLSA claims.

The appellants assert that the Union, which is not a party to these proceedings, cannot conduct the arbitration in good faith on behalf of the employees. An important issue at arbitration will be the scope of the collective bargaining agreement, specifically, whether it includes the Long Haul addendum. Appellants contend that since Union officials accepted the addendum, and apparently consider it to be part of the agreement the Union has a conflict of interest and cannot fairly represent the employees' claims. This conflict of interest, the employees argue, relieves them of any

duty to arbitrate. *See Hiller v. Liquor Salesmen's Union Local No. 2*, 338 F.2d 778 (2d Cir. 1964). In addition, appellants, in sworn answers to interrogatories, recite numerous occasions on which they have unsuccessfully requested the Union to prosecute their grievances concerning overtime pay. The employees assert that this alleged wrongful refusal to process grievances on the part of the Union relieves them of any contractual obligation to arbitrate. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1001-02 (9th Cir. 1970). This issue was raised below but the district court made no specific findings. We express no opinion on whether the plaintiffs have alleged sufficient grounds for questioning the capacity of the Union to fairly process the grievance but we remand for the question to be explored by the district court.

The cause is remanded for further proceedings in the district court.

§ 3. Stay of Proceedings Where Issue Therein Referable to Arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 185. Suits by and Against Labor Organizations.

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its

duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

§ 201. Short Title.

This chapter may be cited as the "Fair Labor Standards Act of 1938".

§ 202. Congressional Finding and Declaration of Policy.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an

unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as praticable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. Definitions.

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, or

(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on

in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(*l*) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of

employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined

by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.

(*o*) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated

through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily enaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and

services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 213(a)(2) of this

title, and whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than $275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than $325,000 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than $362,500 (exclusive of excise taxes at the retail level which are separately stated);

(3) is engaged in laundernig, cleaning, or repairing clothing or fabrics;

(4) is engaged in the business of construction or reconstruction, or both;

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such

owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 206(a)(1) of this title, and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 207 of this title. A violation of the preceding sentence shall be considered a violation of section 206 or 207 of this title, as the case may be.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

§ 204. Administration.

Creation of Wage and Hour Division in Department of Labor; Administrator

(a) There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

Appointment, selection, classification, and promotion of employees by Administrator

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this

chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Administrator may establish and utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

Principal office of Administrator; jurisdiction

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

Annual report to Congress; studies of exemptions to hour and wage provisions and means to prevent curtailment of employment opportunities

(d)(1) The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by

this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent. Such report shall also include a summary of the special certificates issued under section 214(b) of this title.

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 213 of this title, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the reports of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 214 of this title.

Study of effects of foreign production on unemployment; report to President and Congress

(e) Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: *Provided,* That he may also include in such report information on the increased employment resulting from additional exports in any industry under this chapter as he may determine to be pertinent to such report.

Employees of Library of Congress; administration of provisions by Civil Service Commission

(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Civil Service Commission is authorized to administer the provisions of this chapter with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 216(b) of this title.

§ 205. Special Industry Committees for Puerto Rico and Virgin Islands.

Establishment; residents as members of committees

(a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 206 of this title to employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under said section to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 208 of this title.

Appointment of committee without regard to other laws pertaining to appointment and compensation of employees of United States; composition of committees

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

Quorum; compensation; employees

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

Submission of data to committees

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

Application of sections 206 and 208 to employees in Puerto Rico or Virgin Islands

(e) The provisions of this section, section 206(c) of this title, and section 208 of this title shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this chapter in the same manner as the minimum wage rate for employees employed in a State of the United States as determined under this chapter. As used in the preceding sentence, the term "State" does not include a territory or possession of the United States.

§ 206. Minimum Wage.

Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry

out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands.

The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

Additional applicability to employees pursuant to subsequent amendatory provisions

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments

of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

Wage rates superseded by recommendation of special industry committee

(c)(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1) of this section.

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragraph (3), be increased—

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased—

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each succeeding year—

(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate is not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, to whom the rate or rates prescribed by subsection (a)(5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate

under subsection (a)(1) of this section which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) of this section shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 208 of this title) fixing a higher minimum wage rate.

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Employees of employers providing contract services to United States

(e)(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

Employees in domestic service

(f) Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

§ 207. Maximum Hours.

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hurs, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 203(s)(1) or (4) of this title, or by an establishment described in section 203(s)(3) of this title, and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 213 of this title by the Fair Labor Standards Amendments of 1961—

(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

(B) for a workweek longer than forty-two hours during the fourth year from such date,

(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No emloyer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forth hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in

excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this section shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar years,

shall not apply to his employees in any place of employment where he is so engaged.

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona-fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations

which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[1] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(e) No employer shall be deemed to have violated subsection (a) of this section by employing any employee or a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee

before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1)-(7) of subsection (d) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(g) Extra compensation paid as described in paragraphs (5)-(7) of subsection (d) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(h) No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.

§ 208. Wage Orders in Puerto Rico and the Virgin Islands.

(a) The policy of this chapter with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage prescribed in paragraph (1) of section 206(a) of this title in each such industry. The Administrator shall from time to time convene an industry committee or committees, appointed pursuant to section 205 of this title, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce

in any such industry or classifications therein. Minimum rates of wages established in accordance with this section which are not equal to the minimum wage rate prescribed in paragraph (1) of section 206(a) of this title shall be reviewed by such a Committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommitte thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this chapter. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that prescribed in paragraph (1) of section 206(a) of this title) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive ad-

vantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and condi-

tions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

§ 209. Attendance of Witnesses.

For the purpose of any hearing or investigation provided for in this chapter, the provisions of section 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

§ 210. Court Review.

(a) Any person aggrieved by an order of the Secretary issued under section 208 of this title may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section

2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically

ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

§ 211. Investigations, Inspections, Records, and Homework Regulations.

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

§ 212. Child Labor Provisions.

(a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided,* That any such

shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

§ 213. Exemptions.

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity,

or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in this workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities) or

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

(i) is not in an enterprise described in section 203(s) of this title, or

(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an

annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

(3) any employee employed by any establishment engaged in laundering, cleaning, or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided,* That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea,

sponges, seaweeds, or other acquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(7) any employee to the extent that such employee is exempted by regulations or orders of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where printed and published or counties contiguous thereto; or

(9) any employee of a street, suburban or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in section 203(s)(2) of this title; or

(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasturizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or

(11) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(12) any employee of an employer engaged in the business of operating taxicabs; or

(13) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under clause (2) of this subsection with respect to whom the provisions of sections 206 and 207 of this title would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or

(14) any employee employed as a seaman on a vessel other than an American vessel; or

(15) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve; or

(16) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek

in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(17) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm: *Provided,* That no more than five employees are employed in the establishment in such operations; or

(18) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities; or

(19) any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements; or

(20) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or

(21) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of

such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or

(22) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.

(b) The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

(2) any employee of an employer subject to the provisions of part I of the Interstate Commerce Act; or

(3) any employee of a carrier by air subject to the provisions of sections 181-188 of Title 45; or

(4) any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof; or

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) any employee of a street, suburban or interurban electric railway, or local trolley or motorbus carrier; or

(8) any employee of a gasoline service station; or

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) any employee of an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if (A) the annual gross volume of sales of such enterprise is not more than $1,000,000 exclusive of excise taxes, and (B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and (C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title.

(c) The provisions of section 212 of this title relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, or to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(d) The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a) (3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factor set forth in section 206 (a) (3) of this title, that economic conditions warrant such action.

(f) The provisions of sections 206, 207, 211 and 212 of this title shall not apply with respect to any employee whose services during the work-week are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act; American Samoa; Guam; Wake Island; and the Canal Zone.

§ 215. Prohibited Acts; Prima Facie Evidence.

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce

in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of Section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the privisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

§ 216. Penalties, Civil and Criminal Liability; Injunction Proceedings Terminating Right of Action; Waiver of Claims; Actions by Secretary of Labor; Limitation of Actions; Savings Provision.

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. (No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.) The court in such action

shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages, When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or section 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction

over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous reciepts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the two-year statute of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore

or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a) (3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1597

CERTIFIED GROCERS OF CALIFORNIA, LTD., a California corporation,

Petitioners,

vs.

ANTONIO R. LEYVA, EDWARD A. BELL, RICHARD O. BRENNER, DAVID CAHAL, WELDON R. CHAPMAN, RICHARD CHASE, GARTH E. COOK, MICHAEL J. COOK, ROBERT S. CROMWELL, CLYDE V. DARR, WESLEY DRAKE, VERN ELLYSON, GEORGE W. FIELDS, JR., PAUL A. FOX, JR., WALTER C. FREEMAN, ROBERT LeROY FULLER, RODNEY G. GOAR, DAVID G. GOLDSMITH, EVERETT JOHNSON, MARSHALL D. JOHNSON, ALBERT G. KNOLL, LEE A. LEWIS, THOMAS P. LUCAS, JOHN J. LUTZ, HARRY C. McMULLAN, FRANCIS C. MILLER, DONALD A. NELSON, WILLIAM D. PATTERSON, LARRY T. PEARCE, BOB ROBERTS, ROBERT J. SABOL, DAVID P. SCHOLERS, DONALD RAY TOWE, ROBERT S. WELLS and ARTHUR WOOLEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME NOW Respondents, and respectfully present this brief to the Court (pursuant to the June 1, 1979 request of the Clerk

of the Court), in opposition to the Petition for a Writ of Certiorari filed by Petitioner herein.

QUESTION PRESENTED

Are employees' statutory claims for unpaid overtime wages, liquidated damages, and reasonable counsel fees under the Fair Labor Standards Act [29 U.S.C. §201, et seq] "referrable to arbitration" under the United States Arbitration Act [9 U.S.C. §3], where the grievance/arbitration provisions of the collective agreement preclude an arbitrator from adjudicating most of the employees' substantive and remedial claims?

STATEMENT OF THE CASE

On July 12, 1976, Respondents, all of whom are long haul drivers employed by Petitioner Certified Grocers of California, Ltd., filed their Complaint, claiming (1) three years' unpaid overtime compensation, an equal amount of liquidated damages, and reasonable attorneys' fees and litigation costs under the Fair Labor Standards Act [29 U.S.C. §201, et seq]

(First Cause of Action), and (2) unpaid overtime wages allegedly due them under the Wholesale Delivery Drivers Agreement between Petitioner and Teamsters Local Union No. 848 (Second Cause of Action).

Respondents' work consists of hauling truck loads of grocery products to and from Certified's Los Angeles warehouse(s), to and from points which are virtually all located within the borders of the State of California. Petitioner has paid Respondents for their intrastate long haul driving hours in accordance with a "mileage"-per-trip formula, set forth in a "Long Haul Agreement" (hereinafter referred to as the "Addendum"), which takes no account of the actual driving hours worked by Respondents--rather than paying Respondents the hourly rate of pay (for straight time and overtime hours) which they contend they should be paid under both the F.L.S.A. and the Wholesale Delivery Drivers Agreement (hereinafter referred to as the "Agreement"). Respondents contend that the Addendum is legally invalid, because it violates the F.L.S.A.'s overtime compensation requirements, and because its

"mileage"-rate provisions have never been submitted to Respondents, by Teamsters Local 848, for ratification or rejection.

Respondents' Union has repeatedly rejected their demands that the "mileage"-rate (and the fictitious "hourly" rate) in the Addendum be discontinued, by negotiation, and that the Union prosecute their grievances protesting denial of overtime pay to intrastate long haul drivers. Under the grievance and arbitration provisions of the Agreement, only the Union--which has never been a party to this lawsuit--has authority to file, prosecute, and arbitrate such grievances.

On February 11, 1977, on motion of Petitioner, the District Court entered an order staying this action "until arbitration has been had in accordance with the collective bargaining agreement". Respondents appealed from that interlocutory order, and on March 19, 1979, the Court of Appeals for the Ninth Circuit issued its decision on that appeal [Appendix "A" to the Petition for Writ of Certiorari herein].

On May 1, 1979, Petitioner filed a lawsuit in the District Court, styled Certified Grocers of California, Ltd. v. Wholesale Delivery Drivers & Salesmen's Union Local 848 [sic], Case No. 79 1573-AAH (PX), seeking declaratory relief, "damages" in whatever sum Respondents may recover from Petitioner herein, and "attorneys' fees and costs" which Petitioner has incurred in defending this lawsuit. On June 18, 1979 (pursuant to an order shortening time granted on the same date), the District Court, over the opposition of all other parties, granted Petitioner's motion to consolidate the two lawsuits, for trial and all other purposes.

In its decision, the Court of Appeals held (inter alia) that

> Count II of the Complaint, the action for wages due under the collective bargaining agreement, is an arbitrable dispute, . . .and [Petitioner] was entitled to a stay of this part of

the action pending its arbitration. . . .
[Petition, Appendix, p.11];

but remanded the case to the District Court for "exploration" of Respondents' assertion "that the Union. . .cannot conduct the arbitration [of Respondents' contractual claims] in good faith on behalf of the employees" [Petition, Appendix, pp.13-14]. The District Court has never conducted any inquiry, or made any finding(s), with respect to the issue of the Union's representation of Respondents in any arbitration of their claims under the collective agreement; instead, over the objection of all parties, it has scheduled the trial of all causes of action of both lawsuits to commence on July 10, 1979.

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that the Court of Appeals, in the decision attacked herein, either

> . . .has rendered a decision in conflict with the decision of

> another court of appeals on the same matter; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court. . . .

as required by Supreme Court Rule 19(1)(b).

On the contrary, the Court of Appeals ruled that Respondents' "FLSA claims here are not within the scope of the arbitration clause", and therefore found it

> . . .unnecessary. . .to address the substantive holding of [Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964)] that where an FSLA claim is arbitrable, a stay of judicial enforcement must be ordered pending resolution by the arbitrator. . . .
> [Petition, Appendix, p.10] [emphasis added]

Moreover, even if the Court of Appeals

decision had not been expressly premised upon its construction of the grievance/arbitration provisions of the collective agreement, the holding that Respondents' F.L.S.A. claims were not arbitrable was thoroughly consistent with the decisions of this Court [Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); United States Bulk Carrier v. Arguelles, 400 U.S. 351 (1971); McKinney v. Missouri-Kansas-Texas Railroad Co., 357 U.S. 265 (1958)], the National Labor Relations Board [General American Transportation Corporation, 228 NLRB No. 102 (1977); Filmation Associates, 227 NLRB No. 237 (1977)], and the only other courts of appeal which have considered that precise issue [Leone v. Mobil Oil Corporation, 523 F.2d 1153 (D.C. Cir. 1975); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5 Cir. 1972)]--all to the effect that employees' federal statutory rights may not be relegated to the arbitral forum.[1/]

1/ Petitioner's contention that Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir. 1974), cert. denied, 419 U.S. 1079 (1974) is "a decision in (Cont.)

1/ Cont.

conflict with the [instant] decision. . . on the same matter", is not supported by the holding of that case or the facts underlying it. At most, Satterwhite held that an arbitration award--issued upon employees' prior, voluntary submission of unpaid overtime compensation grievances--"is dispositive of a statutory claim under FLSA" asserted in a subsequent federal court lawsuit. 496 F.2d at 450, 452. In that case, the employees had already received, through arbitration prosecuted by their union, (straight time) recovery on part of their (time-and-one-half) claims; in the instant case, however, Respondents have attempted, in vain, for several years, to induce Teamsters Local 848 to prosecute their contractual claims for unpaid overtime compensation, and the overt conflict between Respondents and their Union is a critical issue, which precludes referral of their F.L.S.A. claims to "arbitration" by their adversaries. Glover v. St. Louis-San Francisco Railway Company, 393 U.S. 324 (1969); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5 Cir. 1972); Hiller v. Liquor Salesmen's Union Local No. 2, 338 F.2d 778 (2d Cir. 1964); cf. IBEW Local 675 (S&M Electric Co.), 223 NLRB No. 223 (1976), Kansas Meat Packers, 198 NLRB 543 (1972). Finally, it must be noted that only by utterly ignoring this Court's Arguelles decision could the Satterwhite court have opined "that Congress intended that wage disputes and racial disputes should not receive the same treatment". 496 F.2d at 451.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated: June 27, 1979

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